

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON**

APRIL L. DAVIDSON (COOK),)
)
Plaintiff/ Appellee,)
)
v.)
)
JEFFREY VENSON DAVIDSON,)
)
Defendant/Appellant,)

Weakley Equity No. 12465

<p>FILED</p> <p>Appeal No. 02A01-9607-CH-00173</p> <p>August 12, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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APPEAL FROM THE CHANCERY COURT OF WEAKLEY COUNTY
AT DRESDEN, TENNESSEE

THE HONORABLE WILLIAM MICHAEL MALOAN, CHANCELLOR

For the Plaintiff/Appellee: _____

For the Defendant/Appellant:

Pamela S. Jones
Dresden, Tennessee

Jesse H. Ford, III
Jackson, Tennessee

AFFIRMED AND REMANDED

HOLLY KIRBY LILLARD, J.

CONCURS:

ALAN E. HIGHERS, J.

DAVID R. FARMER, J.

OPINION

This is a child custody case in which custody of the children has changed several times between the father and mother. In this proceeding, the trial court found a material change of circumstances warranting a change of custody from the father to the mother. We affirm.

Appellant Jeffery Venson Davidson (“Father”) and Appellee April L. Davidson (Cook) (“Mother”) were married in 1986. During the marriage, they had two children, Crystal and Justin. They were also raising Mother’s child from a previous relationship, Shayna. The parties divorced in 1992. Father received temporary custody of all three children pending the divorce, but the final divorce decree awarded custody of the children to Mother. A little over five months later, Father filed a petition seeking change of custody. In March 1993, the trial court granted Father custody of the children based on the following Findings of Fact and Conclusions of Law:

This case began with a temporary custody hearing on February 10, 1992. The Court awarded the temporary custody of the parties’ minor children to the defendant father. The Court found the mother had moved from the marital residence in Greenfield, Tennessee, and her housing and job situation were uncertain. The Court felt it would be in the best interest of the children that they remain in the marital home on a temporary basis.

On March 30, 1992, the Court granted a divorce and awarded custody of the parties’ three minor children to the plaintiff mother. The Court felt the mother’s situation had stabilized. The Court further criticized the defendant father for allowing his girlfriend to spend the night in the marital home with the children present.

The father filed a petition for change of custody which was heard on December 18, 1992. The Court found significant change of circumstances. The father had married his girlfriend and continued to reside in the former marital residence. The children were attending church on a regular basis while with the father. The father was concerned about behavioral problems with his daughter, Shayna, and took her to Northwest Counselling Center in Martin, Tennessee. Pam Henson at Northwest Counselling Center saw Shayna on several occasions. Shayna disclosed to Ms. Henson that one or more boyfriends had spent the night with the mother. Ms. Henson contacted the mother and asked that she participate in the counseling sessions. The mother did not participate. Ms. Henson stated the “child’s present life is too confusing” and the children were growing up on their own without any parental supervision. The mother was not taking the children to church.

Plaintiff admitted on cross-examination that she had a live-in boyfriend who had stayed in her home for approximately eight weeks. The Court was further concerned about the children staying in the plaintiff’s father’s mobile home where five persons resided.

Based on all the foregoing, the Court finds it is in the best interest of the minor children that custody be changed from the mother to the father.

The order changing custody to Father was not appealed.

In October, 1995, Father filed a Petition to Modify Visitation, in which he proposed moving to Walnut Ridge, Arkansas. The purported reason for the move was a job opportunity which would double his salary. Mother responded by filing a Petition to Change Custody. She alleged a change in circumstances, citing, among other things, Father's unstable job history and his affair with another woman while separated from his new wife.

At the trial, it was undisputed that, since the Father took custody of the children, he and his current wife, Debbie Davidson, had separated once, reconciled, and then separated again. Prior to their second separation, Debbie Davidson had an altercation with Father's mother in which she struck Father's mother. The children witnessed this assault on their grandmother.

During Father's second separation from Debbie Davidson, another woman, Ruby Beauchamps ("Beauchamps"), moved into Father's house with her own two children. During this time, Debbie Davidson attempted suicide and then signed herself into a mental facility for approximately six days. Debbie Davidson also filed for divorce during this period. After living with Father and the parties' children for six weeks, Beauchamps reconciled with a prior boyfriend and moved out. Debbie Davidson moved back into the house with Father. Debbie Davidson subsequently asked her lawyer to non-suit her petition for divorce.

Father acknowledged that, since he was awarded custody of the children, he has lived at four different locations and has held four different jobs. One of the jobs was that of a police officer with the McKenzie Police Department. The chief of police testified that, during Father's tenure as a police officer, he received several complaints about him. One complaint was that Father had been seen with Beauchamps in his police car while on duty. Ultimately, Father was asked to resign from the police force.

Moreover, a police officer testified that, during the time Beauchamps was living with Father, the police officer found a child standing in the street outside Father's residence, with no adult supervision. He testified that it took several minutes for anyone to respond to his knocks at the door, and that he assumed, from their appearance when they finally answered the door, that Father and Beauchamps had been sleeping. The police officer thought the child in the street was Father's, but Beauchamps testified that the child was hers.

Mother presented disputed evidence that Debbie Davidson repeatedly telephoned Beauchamps and called her obscene names. These calls were taped on the answering machine. Beauchamps also asserted that Debbie Davidson cursed and threatened her in the parties' children's presence. Moreover, there was testimony that, after Beauchamps moved out and Father reconciled with Debbie Davidson, Father and the children drove Debbie Davidson to Beauchamps' home, where Debbie Davidson had a verbal confrontation with Beauchamps' boyfriend over some photographs of Father and Beauchamps.

Beauchamps testified that she was pregnant with Father's child, but Father disputed that the child was his. Mother also presented disputed testimony that Father often drank and smoked in front of the children, that Beauchamps' two-year-old child drank some beer from a bottle Father had left on a table, that one of the children had picked up Father's service revolver when it was hanging from the back of a chair, and that Father had had the children lie for him on occasion.

Father testified that his life has stabilized since he reconciled with Debbie Davidson. He testified that his family was living with Debbie Davidson's mother in Arkansas. In his original petition to modify visitation, Father cited a monetarily favorable job opportunity in Arkansas. In his testimony at trial, Father admitted that he did not obtain this job. Father blamed his failure to get this job on missing an application deadline because Mother purportedly refused to care for the children, forcing him to stay in Tennessee to care for them. He testified that he and Debbie Davidson were both employed at a Wal-Mart store in Arkansas, and acknowledged that he was not making any more money than he had made in Tennessee. Father stated that the children were happy in Arkansas and doing well in school.

Mother testified that her life has stabilized since she lost custody of her children. She has gotten out of debt and is living by herself in a rented four-bedroom house, with a bedroom for each child. During the time in which Father had custody, Mother admitted to having lived in several different locations and to having had several relationships, including one failed marriage. She testified that she is now employed, and that she has located a school for the children with an after-school program for the children's care until she gets off work. Her job requires her to work one weekend per month, but she testified that she has made arrangements with her sister to care for the children during this time.

The trial court found that there had been a material change of circumstances and ordered

custody changed back to Mother. From the bench, the court recounted the reasons leading up to the first change of custody to Father, and then described the reasons for changing custody back again:

They [Father and Debbie Davidson] were living in the home that the children grew up in, in Greenfield, and appeared to have a stable job and a stable marriage, but things sure have changed since then. Since then, . . . Mr. Davidson has changed jobs, changed homes, changed relationships, and I just can't imagine that Mr. Davidson, when I changed custody to him for his wife's misconduct, does exactly the same thing, if not worse, and exposing the children to an improper and an immoral relationship, moved to Arkansas. . . . To his credit, he has reconciled with his present wife, but all of this turmoil and instability is bound to have a negative effect on the children. . . . The Court finds that there is sufficient change of circumstance and the Court is going to change the custody of these three minor children to Mrs. Cook [Mother].

The court's subsequent Order stated that "Defendant [Father] has shown a complete lack of stability and proper judgment." The court also ordered Father to pay child support and awarded Father visitation. Father now appeals the trial court's decision to change custody of the children back to Mother.

In child custody cases, appellate review is *de novo* upon the record, with a presumption of the correctness of the trial court's factual findings. Tenn. R. App. P. 13(d); *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984); *Dalton v. Dalton*, 858 S.W.2d 324, 327 (Tenn. App. 1993).

This Court has repeatedly emphasized the importance of stability for children involved in divorce. *See Contreras v. Ward*, 831 S.W.2d 288, 290 (Tenn. App. 1991). An order awarding custody cannot be changed in the absence of a showing of new facts or "changed circumstances" requiring an alteration of the original custody award. *Woodard v. Woodard*, 783 S.W.2d 188, 189 (Tenn. App. 1989). In order for a change of circumstances to warrant a change of custody, the change must be necessary to prevent substantial harm to the child. *Wall v. Wall*, 907 S.W.2d 829, 834 (Tenn. App. 1995). As stated in *Wall*:

Custody is not changed for the welfare or pleasure of either parent or to punish either parent, but to preserve the welfare of the child. Custody is not changed because one parent is able to furnish a more commodious or pleasant environment than the other, but where continuation of the adjudicated custody will substantially harm the child.

Id. The type of behavior necessary to precipitate a change of custody must be that " 'which clearly posits or causes danger to the mental or emotional well-being of a child (whether such behavior is immoral or not). ' " *Musselman v. Acuff*, 826 S.W.2d 920, 924 (Tenn. App. 1991) (quoting *Ballard v. Ballard*, 434 So. 2d 1357, 1360 (Miss. 1983)).

In the instant case, it was unrefuted that Father has changed jobs several times, has moved

several times, has repeatedly separated and reconciled with his current wife, and permitted Beauchamps, a woman to whom he was not married, to move in with him and the children for approximately six weeks. The children were exposed to conflict between Debbie Davidson and Beauchamps and between Debbie Davidson and their grandmother. The lack of parental supervision while Beauchamps and her children were living with Father and his children was such that one of Beauchamps' children was found wandering in the street. In addition, there were allegations that Father failed to keep his gun out of the children's reach and that Father smoked and drank in the children's presence. Father's most recent move, ostensibly for a better job, resulted in a job which did not improve the family's financial situation. It is clear that Father's ongoing instability created an unhealthy environment for the children and poses a substantial threat of harm, constituting a material change of circumstances sufficient to consider a change of custody.

After it has been determined that a material change in circumstances has occurred, the trial court must perform a comparative fitness analysis to determine if custody should be changed. In this case, Mother also has a history of instability. During the time in which she did not have custody of the children, she lived in several different places and was involved in another failed marriage. However, the proof indicated that Mother now has stable employment, has gotten out of debt, and is living by herself in a home with plenty of room for the children.

In custody cases, the trial court must make a choice between two imperfect parents with human failings and foibles. At the trial in this cause, the trial court had the opportunity to observe the witnesses' demeanor, and the weight and credit accorded the witnesses by the trial court is entitled to great weight. *In re Parsons*, 914 S.W.2d 889, 895 (Tenn. App. 1995). Given this deference, and after reviewing the testimony and evidence in the record, we conclude that the evidence does not preponderate against the trial court's decision to change custody of the children to Mother. The decision of the trial court is affirmed.

Mother also seeks an award of attorney's fees and expenses incurred in this appeal. We find that Mother should be awarded attorney's fees and expenses for this appeal, and remand this cause to the trial court for a determination of the appropriate amount. *See D v. K*, 917 S.W.2d 682, 687 (Tenn. App. 1995).

The decision of the trial court is affirmed. This case is remanded for a determination of Appellee's reasonable attorney's fees and expenses on appeal. Costs are assessed against Appellant,

for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

ALAN E. HIGHERS, J.

DAVID R. FARMER, J.